

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 15, 2002 Session

**STATE OF TENNESSEE DEPARTMENT OF CHILDREN'S SERVICES
v. RICHARD AGBIGOR, SR.**

**Appeal from the Juvenile Court for Davidson County
Nos. 9719-37175 & 9719-37178 Betty Adams-Green, Judge**

No. M2000-03214-COA-R3-JV - Filed November 15, 2002

Richard Agbigor, Sr. takes this appeal from the Juvenile Court of Davidson County, challenging that court's termination of his parental rights to two children, R.A. and L.M.A. Although these two children are only two of six children to whom the trial court terminated the parental rights of both Richard Agbigor, Sr. and Terry C. Agbigor, the mother does not appeal the termination of her parental rights, and the father appeals the termination of parental rights only to his two biological children. Since we find that Mr. Agbigor effectively waived his right to counsel below and that clear and convincing evidence established grounds for termination and that termination of parental rights of Mr. Agbigor is in the best interest of the children. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed

WILLIAM B. CAIN, J., delivered the opinion of the court, in which BEN H. CANTRELL, P.J. and JEFFREY F. STEWART, SP. J., joined.

Merrilyn Feirman, Nashville, Tennessee, for the appellant, Richard Agbigor.

Douglas Earl Dimond, Nashville, Tennessee, for the appellee, Department of Children's Services.

OPINION

Richard Agbigor, Sr. and Terry Caruthers Agbigor are husband and wife, and Richard Agbigor, Sr. is the putative legal father of all six of the children: (1) L.H.C., born February 13, 1993; (2) R.A., born April 26, 1994; (3) A.O.A., born May 12, 1995; (4) L.M.A., born August 28, 1996; (5) S.A., born April 7, 1998; and (6) N.C., born April 1, 1999. Paternity testing established that he was the biological father of only two of these children, R.A. and L.M.A. The extensive record before this Court reveals a three day proceeding conducted over a three month period, after which the trial court entered a Final Decree of Guardianship terminating the parental rights of both parents as of October 30, 2000.

The children at issue in this appeal, R.A. and L.M.A., first came into state custody on August 25, 1997, after police responded to a call prompted by domestic violence between Mr. and Mrs. Richard Agbigor, which resulted in Mr. Agbigor's arrest on assault charges. The trial court entered an emergency protective order removing the children from the custody of Mr. And Mrs. Agbigor and appointed counsel for both parents. At this point in the proceedings, Thomas Miller became Appellant's first and only counsel until November 21, 2000. Following a preliminary hearing, the Juvenile Court entered an order on September 4, 1997, placing the children in state custody and ordering Mr. Agbigor to pay support of \$150.00 per month.

On September 17, 1997, the Department of Children's Services prepared plans of care for the children that contained responsibilities for the parents to complete in order to regain custody of their children. The goal of the plans was reunification of Mr. Agbigor with his children. Mr. Agbigor's responsibilities included attending parenting class and demonstrating parenting skills, attending the P.E.A.C.E. program, obtaining housing, keeping DCS informed of his address and telephone number, cooperating with DCS and paying any court ordered support. He was also required to remain free of further arrests related temper induced domestic disturbances regarding Ms. Agbigor.

An Agreed Order entered November 21, 1997 reflects Mr. Agbigor's agreement that the children were dependant and neglected and that the children had come into state custody following domestic violence between the parents. Mr. Agbigor admitted that the children had previously been removed in Florida placed in his custody with the condition that he not leave the children in Mrs. Agbigor's unsupervised care and that he had done so in violation of the Florida court order.

After Mrs. Agbigor gave birth to a daughter on April 7, 1998, a new plan of care was developed requiring Mr. Agbigor to cooperate with all social service providers, to get housing and employment, and to verify his wages to DCS. He was further required to attend parenting class for newborns. The goal of the plan was reunification/adoption.

Mr. Agbigor obtained housing and full-time employment and visited his children on a weekly basis. Progress reports from DCS indicated in August of 1998 that Mr. Agbigor had attended a parenting session and the P.E.A.C.E. program. Although he had obtained housing through the Metropolitan Development and Housing Agency, he lacked a support system to help him raise the children.

On November 6, 1998, plans of care were developed for the children that listed the goal as adoption, stating that DCS would seek to terminate parental rights due to persistent unsatisfactory conditions and the parents' lack of concern. Mr. Agbigor was present and signed the plan but disagreed with the goal change to adoption. Following a hearing on March 5, 1999, the Juvenile Court entered a family services order on April 22, 1999, in which it was found that, because the goal had been changed to adoption, the parents had no responsibilities.

On March 31, 1999, counsel for the Department of Children's Services forwarded a letter to both Mr. Agbigor and Terry Caruthers Agbigor (with copy to Attorney Thomas Miller) informing them that a Petition to Terminate Parental Rights had been filed and that an appearance hearing had been set for April 30, 1999 at 9:30 a.m. A copy of the Petition to Terminate Parental Rights was forwarded with the letter and clearly asserted that the termination petition included Mr. Agbigor's biological children, R.A. and L.M.A. The petition asserted grounds for termination of parental rights as being abandonment and persistent unremedied conditions preventing the children's return.

On March 28, 2000, after several continuances, the Juvenile Court entered an order drafted by counsel for Mr. Agbigor setting the petition for final hearing on July 24th and 25th, 2000, beginning at 8:30 a.m. That order listed R.A. and L.M.A. among the children at issue. Final permanency plans for both R.A. and L.M.A. were prepared May 9, 2000, and on July 14, 2000, the guardian ad litem for R.A. and L.M.A. filed a Certificate for Readiness. On July 14, 2000, the same guardian ad litem filed a report with the court which detailed Mr. Agbigor's history since November 12, 1999. On July 18, 2000, the Department of Children's Services filed an Amended Petition to Terminate Parental Rights, adding substantial noncompliance with his permanency plan responsibilities as a third ground to terminate Mr. Agbigor's parental rights.

On July 20, 2000, Mr. Agbigor's attorney, Thomas Miller, filed a "Notice in Lieu of Certificate of Readiness" stating that he could not provide a certificate of readiness or prepare for trial because Mr. Agbigor had not contacted him for several months and that he had learned that Mr. Agbigor had left the country for several weeks just before the trial. On the same date and for the same reasons, Mr. Miller filed a motion to withdraw as Mr. Agbigor's attorney.

Trial started as scheduled July 24, 2000, at 8:30 a.m., and when Mr. Agbigor failed to appear at the appointed hour, the court granted Mr. Miller's Motion to Withdraw. Approximately one hour after the start of the proceedings of July 24, 2000, Mr. Agbigor appeared in court and was informed by the trial court that his attorney had withdrawn and that the trial would proceed with Mr. Agbigor acting as his own counsel. When asked whether he understood that he would be representing himself, Mr. Agbigor simply stated "yes." The trial court conducted a two day trial supplemented by a third day of proceedings on September 1, 2000. The Juvenile Court entered a final order on October 30, 2000, terminating the parental rights of Mr. Agbigor.

On November 2, 2000, Mr. Agbigor filed a motion stating that he had not been represented by counsel at trial and had been unfairly treated and requesting counsel on appeal. On that same date he filed a notice of appeal from the October 30, 2000 final judgment. The Juvenile Court appointed Mr. Agbigor's present counsel on November 21, 2000.

On February 6, 2001, the Juvenile Court filed an Amended Final Decree of Guardianship, substantially the same as the October 30, 2000 order but correcting a statement in the first order to indicate that R.A. was, in fact, Mr. Agbigor's biological child.

II. DUE PROCESS

The first issue on appeal is the assertion by the appellant that the trial court violated his due process and statutory rights by requiring him to go forward with the termination trial without counsel.

At the time of the July 24-25, 2000, termination proceedings, Mr. Agbigor had been continuously represented by appointed counsel, Thomas Miller, since August 25, 1997. The trouble with Mr. Agbigor's complaint about lack of effective assistance of counsel for the proceeding is best reflected by the record as the case started at 8:30 a.m. on July 24, 2000.

THE COURT: - - the mom. And who else do I have. Mr. Miller, are you just visiting or who do you represent?

MR. MILLER: We'll see in a moment. I represent - - I'm attorney of record for Richard Agbigor, the father of some of these children. Based on my lack of contact with my client, a few days ago, I filed a notice in lieu of a certificate of readiness and a motion to withdraw as his attorney. He is not present this morning and as a preliminary matter, I'd like the Court to hear me on my motion to withdraw.

....

THE COURT: . . . Mr. Miller, I guess that we're ready to hear you on your motion.

MR. MILLER: Could I ask if the document's made it to - - I filed one copy of each with the clerk's office. I know there are a lot of files. Do you have those or do you want to use my copy?

THE COURT: I think I'm going to have to use yours because they are not in this file, but they may be in one of the others.

MR. MILLER: I filed this sometime last week and they both say pretty much the same thing; that is, that I've had no contact with Mr. Agbigor for the last several months. I've represented him for a long time through dependency neglect proceedings and on up until he was here at the appearance on the termination. I know Mr. Agbigor knows how to contact me because he's done that before and, in fact, on several occasions what he usually did when he wanted to see me, he knows I'm here a lot and he just comes up here and hangs out in the hall until he catches me.

THE COURT: Well, he's been here for the last hearing, I believe.

MR. MILLER: And he's always told me that he's very clear that he - - whatever the kids are his he wanted them, and that was the way we would proceed. So it surprised me not hearing from him - - it surprised me, and I understood that he continued to visit his kids.

It surprised me even more when I learned that in the time that from my standpoint is crucial to prepare for trial, he left the country without telling me. So then I assumed that he would come back and we would get in contact. He hasn't done that. I've not heard from him to this moment, and I was going to make this same request even if he were here because I don't prepare for trials unless I have a

client to work with. I don't have a client to work with and he's not even here this morning.

THE COURT: We have personal service on him, do we not?

MS. CRAWFORD: Yes, Your Honor.

THE COURT: He was here, I believe, early in the spring when we first began setting different dates - -

MR. MILLER: I don't recall. I can't say to the Court that I'm clear that he had actual knowledge of today's date. I don't know if he did nor not.

THE COURT: Ms. Crawford, do you have - -

MS. CRAWFORD: Well, Your Honor, I would have to dig through all my orders, but it's the State's position that it's the parents['] responsibility when they have appointed counsel to maintain contact.

THE COURT: Well, I agree with that, and I think Mr. Miller and you know what I'm going to do. I'm going to ask him - -

MR. MILLER: I'm going to ask you to not make me sit here for the next 20 hours when I'm not prepared to do anything and can't do anything.

THE COURT: Well, I guess that we can - - I hate to do that.

MS. CRAWFORD: Now, I'm prepared if Mr. Agbigor shows up half way through the day or something, but, Your Honor, it is our position he had court-appointed counsel. It's his responsibility to maintain contact. Now, the parents have to have some sort of responsibility - -

THE COURT: Well, if they can't have responsibility for getting to trial, getting to court, I don't know that we can legitimately consider them parenting the children because that's the biggest responsibility anybody can have, and I just - - that flies in the face of responsible behavior. Alright, Mr. Miller. We'll let you - - grant your motion to withdraw.

MR. MILLER: Thank you, Your Honor.

THE COURT: If Mr. Agbigor comes in, I mean, I understand your position, but even if he were to walk through the door, you would not be prepared to go forward today. Given that, I think you may be excused.

MR. MILLER: Thank you.

After opening statements, the mother of the children, Terry Caruthers Agbigor, was called as a witness.¹ In the early portion of her testimony, at approximately 9:30 a.m., Mr. Richard Agbigor, Sr. entered the courtroom. The record then reflects:

THE COURT: I believe Mr. Agbigor, he needs to come on in.

THE COURT OFFICER: Do you want me to bring him in?

THE COURT: Yes.

¹ The trial began with the testimony of John Odjegba, the alleged father of the oldest child, L.C., whose testimony was not material to the issues in this appeal.

MS. CRAWFORD: Does Your Honor want to address with him regarding the status of his counsel?

THE COURT: Mr. Agbigor, your counsel has asked to be relieved. Your attorney has asked to be relieved because evidently there's a period of time he was totally unable to get into contact with you. And he obviously, since he couldn't get in contact with you, was unable to prepare for today's proceedings. So he has withdrawn from your case.

Now, you were aware that the case was going to trial today, but you'll be here with yourself and we will give you an opportunity to ask questions as we go forward. But you will be in a position of representing yourself. Do you understand what I'm saying?

MR. AGBIGOR: Yes.

THE COURT: Now, had Mr. Miller been able to get in contact with you in the months preceding the trial, he could be here with you. But it's very difficult. You put a lawyer in a bad situation when we asked him to come in and represent your interest and they haven't had a chance to prepare. So you're going to have to take on the responsibility of presenting your case in court. Alright.

MS. CRAWFORD: Can we let the record reflect it was nine thirty when Mr. Agbigor arrived?

THE COURT: Yes.

At this critical moment in the termination proceedings, and before any testimony had been offered to the detriment of Mr. Agbigor, he offered not one word to contradict the recitations made directly to him by the trial court about his attorney's inability to contact him over a period of months and about his total failure to cooperate with, or even to contact, his appointed counsel.

A defendant in a termination of parental rights case has no absolute right to be represented by counsel. *Lassiter v. Department of Soc. Serv.*, 452 U.S. 18 (1981); *In re: K.D.D.*, No. M2000-01554-COA-R3-JV, 2001 WL 219669 (Tenn. Ct. App. Mar. 7, 2001).

Attorney Thomas Miller had diligently represented Mr. Agbigor for nearly three years before the final termination proceeding. Mr. Miller represented to the trial court in his Motion to Withdraw and in his statement in open court shortly after 8:30 a.m., July 24, 2000, that Mr. Agbigor had not contacted him in several months and that he had been unable to contact Mr. Agbigor. It is undisputed that Mr. Agbigor voluntarily chose a month long visit to Nigeria and returned only two weeks before the trial was to begin. He still did not contact his attorney in order to prepare for the hearing and did not appear in the court at the time the termination hearing was scheduled. This is not a case wherein the court failed to provide competent counsel for Mr. Agbigor. He offers no complaint as to the services rendered to him for nearly three years by Mr. Miller. He simply failed to cooperate with his own counsel. Further, upon belated arrival at the termination hearing on July 24, 2000, when confronted by the court with the basis for Mr. Miller's application to withdraw as his counsel, he uttered not one word in denial of Mr. Miller's representations to the court and offered no contradiction of the assertion that he had failed to contact his attorney for a number of months.

Therefore, Mr. Agbigor effectively waived his right to the continued representation of the attorney who had served him for nearly three years prior to the termination hearing in a manner apparently satisfactory to Mr. Agbigor.

From the very beginning of the proceedings to terminate his parental rights, Mr. Agbigor was made aware of the seriousness of the final termination hearing. The DCS letter to him of March 31, 1999 contained the following:

A Final Hearing on the issue of termination of parental rights will be set at this or a subsequent hearing so it is VERY IMPORTANT if you wish to participate, to be present at this hearing. FAILURE TO APPEAR FOR THE FINAL HEARING MAY RESULT IN A JUDGMENT TERMINATING PARENTAL RIGHTS BEING ENTERED AGAINST YOU.

The actual petition to terminate parental rights served upon him set forth in bold, capital letters the names and respective dates of birth of both R.A. and L.M.A. and made it clear that the petition sought to terminate his parental rights as to these two children.

His own conduct in refusing to cooperate with the attorney who had represented him since August 25, 1997, is the sole reason he had no attorney at the final termination hearing. By his own conduct, he effectively waived his less than absolute right to appointed counsel. *See Lassiter*, 452 U.S. 18; *In re: K.D.D.*, 2001 WL 219669.

III. SUFFICIENCY OF EVIDENCE

Appellant also complains that “clear and convincing evidence does not support the trial court’s termination of Mr. Agbigor’s parental rights pursuant to Tenn. Code Ann. § 33-1-113.” Counsel correctly identifies the standard articulated by our legislature, as Tennessee Code Annotated section 36-1-113(c)(1) makes it clear that the statutory grounds for termination of parental rights must be factually established under a “clear and convincing evidence” standard. *See In Re C.W.W.*, 37 S.W.3d 467, 474 (Tenn. Ct. App. 2000). The following is but an example of this Court’s continued discourse concerning this standard.

This court recently attempted to describe the clear and convincing evidence standard, explaining that:

Although it does not require as much certainty as the “beyond a reasonable doubt” standard, the “clear and convincing evidence” standard is more exacting than the preponderance of the evidence” standard. *O’Daniel v. Messier*, 905 S.W.2d 182, 188 (Tenn. App. 1995); *Brandon v. Wright*, 838 S.W.2d 532, 536 (Tenn. App. 1992). In order to be clear and convincing, evidence must eliminate any serious or substantial doubt about the correctness of the conclusions

to be drawn from the evidence. *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n. 3 (Tenn. 1992); *O’Daniel v. Messier*, 905 S.W.2d at 188. Such evidence should produce in the fact-finder’s mind a firm belief or conviction as to the truth of the allegations sought to be established. *O’Daniel v. Messier*, 905 S.W.2d at 188; *Wiltcher v. Bradley*, 708 S.W.2d 407, 411 (Tenn. App. 1985). In contrast to the preponderance of the evidence standard, clear and convincing evidence should demonstrate that the truth of the facts asserted is “highly probable” as opposed to merely “more probable” than not. *Lettner v. Plummer*, 559 S.W.2d 785, 787 (Tenn. 1977); *Goldsmith v. Roberts*, 622 S.W.2d 483, 441 (Tenn. App. 1981); *Brandon v. Wright*, 838 S.W.2d at 536.

M.C.G., 1999 WL 332729, at * 6 (quoting *Bingham v. Knipp*, No. 02A01-9803-CH-00083, 1999 WL 86985, at *3 (Tenn. Ct. App. Feb. 23, 1999) (no perm. app. filed.); *In Re C.W.W.*, 37 S.W.3d at 474, No. 01A01-9809-JV-00461.

Concerning this Court’s duty with regard to a finding under the standard,

This Court has held that a “clear, cogent and convincing evidence” standard cannot co-exist with a “preponderance of the evidence” standard on the issue of persuasion. *Estate of Acuff v. O’Linger*, 56 S.W.3d 527, 535 (Tenn. Ct. App. 2001). Whether the “clear, cogent and convincing evidence” standard is imposed by statute or under the common law and whether the trial is by jury or the trial judge sitting without a jury, appellate courts are required to determine from the record whether or not the party bearing the burden of proof has established that his factual contentions are “highly probable.” *Colorado v. New Mexico*, 467 U.S. 310, 315, 104 S.Ct. 2433, 2437-38, 81 L.Ed.2d 247 (1984); *Estate of Acuff v. O’Linger*, 56 S.W.3d 527, 533-537 (Tenn. Ct. App. 2001); *Shell v. Law*, 935 S.W.2d 402, 405 (Tenn. Ct. App. 1996).

It is likewise correct to observe the established rule that: “In reviewing termination decisions, this court has recognized that the existence of any one of the statutory bases will support a termination of parental rights.” *In re C.W.W.*, 37 S.W.3d 467, 473-74 (Tenn. Ct. App. 2000) (citing *In re M.C.G.*, No. 01A01-9809-JV-00461, 1999 WL 332729, at *5 (Tenn. Ct. App. May 26, 1999) (no perm. app. filed); *Department of Children’s Servs. v. Darr*, No. 03A01-9706-JV-00213, 1998 WL 128874, at *3 (Tenn. Ct. App. Mar. 24, 1998) (no perm. app. filed).

State of Tennessee Dep’t of Children’s Servs. v. Layne, No. M2001-00652-COA-R3-JV, 2002 WL 126320 at * 6 (Tenn. Ct. App. Feb. 1, 2002).

Tennessee Code Annotated section 36-1-113(g)(3)(A)(2001) provides the basis for termination for failure to remedy conditions to be:

The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:

(i) The conditions which led to the child's removal or other conditions which in all reasonable probability would cause the child to be subjected to further abuse or neglect and which, therefore, prevent the child's safe return to the care of the parent(s) or guardian(s), still persist;

(ii) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and

(iii) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home.

The trial court terminated the parental rights of Mr. Agbigor on the separate grounds of failure to remedy the persistent conditions in his life that prevented the children's return to him and substantial non-compliance with his permanency plan responsibilities.

The trial court found:

That pursuant to T.C.A. 36-1-113(g)(3)(A), the said children have been removed from defendant parents for more than six (6) months and the conditions which led to the removal or other conditions which in all reasonable probability would cause the children to be subjected to further abuse or neglect and which, therefore, prevent the children's return to the care of defendants still persists; that there is little likelihood that these conditions will be remedied at an early date so that the children can be returned to the defendants in the near future; and the continuation of the legal parent and child relationship greatly diminishes the children's chances of early integration into a stable and permanent home. By Mrs. Agbigor's own testimony she testified that nothing had changed since the children came into custody other than the fact that she does not have children with her.

Despite the history of violence between the parties, at the time of trial, Mrs. Agbigor was still married to Mr. Richard Agbigor.

Because of domestic violence occurring between Mr. and Mrs. Agbigor, all six of Terry Caruthers Agbigor's children, including the two at issue in this case, R.A. and L.M.A., were placed in state custody under the order of the Davidson County Juvenile Court, entered August 25, 1997. In the agreed order of November 21, 1997, Mr. Agbigor agreed, and the court found, that the children were dependant and neglected; further, that children had previously been removed from custody of

Mr. and Mrs. Agbigor in the State of Florida and placed in the custody of Mr. Agbigor with the condition that he not leave the children in the unsupervised care of Mrs. Agbigor. But he consistently violated the Florida order and left the children with Mrs. Agbigor. By May of 1998, Mr. Agbigor had returned to Tennessee from an extended visit in Nigeria, obtained housing and full employment, and was visiting R.A. and L.M.A. weekly. He attended a parenting session, but he had no support system to help him raise children and had no care taker for the children during his working hours other than Mrs. Agbigor. While the record shows that Mr. Agbigor made substantial progress in his school schedule and in his work schedule, he was unable or unwilling to properly provide for his children. For a period of three years, he refused DCS's recommended therapy and counseling and made little effort to build a reliable child care and support network such that these admittedly dependant and neglected children could be safely reunified with him. The evidence is clear and convincing that the conditions which led to their removal from the custody of the appellant persisted with little likelihood of early remedy. Thus, the continuation of the parent-child relationship at issue greatly diminished the chances of R.A.'s and L.M.A.'s early integration into a safe, stable and permanent home. The trial court correctly granted the Petition for Termination of Parental Rights under T.C.A. 36-1-113(g)(3)(A). *In Re: C.D.B.*, 37 S.W.3d 925 (Tenn. 2001). *See also Farmer v. Department of Children's Servs.*, No. 01A01-9610-JV-00485, 1997 WL 803709 (Tenn. Ct. App. Dec. 30, 1997); *State v. Bardin*, No. 03A01-9705-JV-00152, 1997 WL 677956 (Tenn. Ct. App. Nov. 3, 1997).

The trial court also terminated Appellant's parental rights pursuant to Tennessee Code Annotated section 36-1-113(g)(2) on the ground of substantial noncompliance with permanency plan responsibilities.

The record shows that Mr. Agbigor made some effort in 1997 and 1998 by attending a parenting class and a P.E.A.C.E. session under the requirements of the first permanency plan. He also obtained housing and a job. In the final year leading up to the termination, however, Mr. Agbigor chose full-time schooling and a heavy workload which left him little time to bother with his responsibilities under the permanency plans. Under such conditions, a permanency plan was developed on November 6, 1998, with the goal of adoption, thereby relieving parental responsibilities on the part of Mr. Agbigor. This action was over his objection, and finally on May 9, 2000, a final permanency plan was developed providing for goals of reunification/adoption. Under this plan, Mr. Agbigor was to obtain recommended counseling, follow the service provider's visitation recommendations, develop a reliable child care and support network and pay child support. Social services providers testified unanimously that Mr. Agbigor complied with none of the requirements of the final plan, and Mr. Agbigor agreed in his testimony that he had not attended the recommended counseling and parenting classes. He maintained that his travel, his work, and his school course load took all of his time and money. He further claimed that his father's illness in Nigeria required him to travel to that country for an extended stay while his children remained in foster care. A review of the record appears to indicate that Mr. Agbigor resented what he considered to be state interference with his family and that he either would not or could not perform his responsibilities under the permanency plans. Thus, clear and convincing evidence supports the

action of the trial court in terminating his parental rights pursuant to Tennessee Code Annotated section 36-1-113(g)(2) for substantial noncompliance with his permanency plan responsibilities.

IV. BEST INTEREST ANALYSIS

Having determined that the trial court was correct in finding that clear and convincing evidence established grounds for termination of parental rights, we must next consider whether or not the record sustains the trial court finding that termination of the parental rights of Mr. Agbigor was in the best interest of the children under Tennessee Code Annotated section 36-1-113(c).

The legislature has provided directions to the court in making a best interest determination:

In determining whether termination of parental or guardianship rights is in the best interest of the child pursuant to this part, the court shall consider, but is not limited to, the following:

- (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
 - (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
 - (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
 - (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
 - (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
 - (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;
 - (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child; or
 - (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.
- Tenn. Code Ann. § 36-1-113(i)(2001).

In its October 30, 2000 Final Judgment and in its February 6, 2001 Amended Final Judgment, the trial court found:

That in terms of best interest, the Defendants have failed to make such an adjustment of circumstances, conduct, or conditions as to make it in the children's

best interest to return to their home in the foreseeable future; that said Defendants have failed to effect a lasting adjustment after reasonable efforts by available social agencies for such duration of time that lasting adjustment does not reasonably appear possible; the Defendants have failed to maintain regular visitation or other contact with the children; that there is no meaningful relationship established between the parent and the child; the Court must also consider the effect of a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition; that the parent or guardian, or other person residing with the parent or guardian has shown brutality, physical, sexual, emotional or psychological abuse or neglect toward other children in the family or household; that the physical environment of the parent's or guardian's home is not healthy and safe, there is suspected criminal activity in the home and such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner; the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child and that Mrs. Agbigor has failed to pay child support consistent with the child support guidelines promulgated by the department pursuant to T.C.A. 36-5-101.

The children [R. A.], [A. A.], and [L. A.] have special needs and require a heightened level of care and attention. The therapist for [R.] and [L.] testified to the extraordinary needs of these two children.

On at least two occasions Mr. Agbigor made unscheduled appearances at [R.'s] school and both times [R.] acted out in a sexual manner.

That it is in the best interest of the said children and the public that all of the parental rights of the Defendant to the said children be forever terminated and that the complete custody, control, and guardianship of the said children be awarded to the State of Tennessee, Department of Children's Services, with the right to place the said children for adoption and to consent to such adoption in loco parentis.

_____ It is not required by law that all of the factors set forth in section 36-1-113(c)(2) must be determined to exist. It is enough that some of the factors are established by clear and convincing evidence. *In re: C.W.W.*, 37 S.W.3d at 475-67.

_____ Although the record in this case does not support a finding that Mr. Agbigor has shown brutality, physical abuse, or sexual abuse as to either of these children or any of the other children nor engaged in criminal activity, abused alcohol or used controlled substances, clear and convincing evidence does show that Mr. Agbigor has not made such an adjustment of circumstance, conduct or conditions as to make it safe and in the child's best interest to be in his home. Such evidence also established that he has failed to effect a lasting adjustment, despite reasonable efforts by available social service agencies, for such duration of time that lasting adjustment appears reasonably possible.

It further appears by clear and convincing evidence that a change of care takers at this time is likely to adversely affect the children's emotional and psychological condition. Mr. Agbigor has also not paid child support consistent with the child support guidelines promulgated by the Department pursuant to T.C.A. 36-5-101. Thus, this court finds that clear and convincing evidence supports the trial court's finding that termination of Mr. Agbigor's parental rights as to R.A. and L.M.A., is in the children's best interest.

V. POST TRIAL PROCEEDINGS PENDING APPEAL

Upon disposal of the issues presented in the appeal from final judgment of the trial court of October 30, 2000, the case took a rather unusual turn. On November 2, 2000, Richard Agbigor, Sr., pro se, filed a Notice of Appeal to the Tennessee Court of Appeals, from the final decision of the Juvenile Court of October 30, 2000. Also on November 2, 2000, he filed a pro se motion in the trial court seeking the appointment of an attorney to represent him on appeal and stating as grounds for such motion: "I was not represented in court in the final trial. Also, I feel that I have been treated unfairly and that the judgment did not reflect the true picture of this case. I am highly disappointed with the judgment."

Pursuant to this motion, the Juvenile Court entered an order appointing Merrilyn Feirman as counsel for Mr. Agbigor, stating in particular,

For the purpose of preparing for the adjudication of matters pending before the Court the Attorney shall have access to all documents or records of the child[ren] that are in the possession of the Tennessee Department of Children's Services and any medical, educational, and/or psychological records available excluding work products of the Office of the District Attorney General and Metropolitan Police Department, as well as the identity of persons making reports/complaints to the Tennessee Department of Children's Services.

This the 21 day of Nov., 2000.

On January 3, 2001, Attorney Merrilyn Feirman filed a motion pursuant to Rule 18 of the Tennessee Rules of Appellate Procedure to allow Mr. Agbigor to proceed as a poor person, together with a motion under Rule 13 of the Tennessee Supreme Court Rules for a transcript of the proceedings involved in the termination hearing. Said motion alleged the continued indigency of Mr. Agbigor and the necessity of a transcript on appeal as grounds therefor. An order of indigency was entered on January 5, 2001, together with an order requiring preparation of a transcript at state expense.

No Rule 59 motion suspending the finality of the October 30, 2000 final judgment was ever filed, but the order of the trial court of November 21, 2000, clearly envisions further proceedings in the trial court. The next document chronologically appearing in the record is the "Amended Final Decree of Guardianship" entered by the Juvenile Court on February 6, 2001. On February 28, 2001, counsel for Mr. Agbigor served notice of the filing of the transcript of the termination proceedings

with the clerk of the Juvenile Court. The next document filed was a “Motion to Set a Hearing for the Motion for New Trial” which was filed by Mr. Agbigor on February 23, 2001, and asserted the following:

Comes now Richard Agbigor, Sr., by and through counsel and pursuant to Rule 60.02(5) of the Tennessee Rules of Civil Procedure, and respectfully moves this Court to set a day and time certain on which to hear his Motion For New Trial. As grounds for this motion, the movant would show as follows:

1. Following a three day trial, on October 30, 2000 this Court entered an order terminating the movant’s parental rights. On February 6, 2001 the order was amended. The movant seeks relief from these orders.

2. Rule 60.02(5) of the Tennessee Rules of Civil Procedure provides in part: On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons . . . any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time . . .

3. The movant believes that it will take approximately 2 hours to hear his Motion For A New Trial.

WHEREFORE, Richard Agbigor, Sr., moves this Court to set a day and time certain on which to hear his Motion For New Trial.

On March 19, 2001, the trial court entered the following order:

This matter was heard before The Honorable Betty Adams Green, Juvenile Court Judge, on the 2nd of March, 2001. Upon the motion, statements of counsel, the record as a whole, and pursuant to Rule 60.02(5) of the Tennessee Rules of Civil Procedure, the Court finds that it is in the best interest of the minor children that the Motion For New Trial be heard on April 16, 2001 at 9:00 A.M. This motion is set for one hour.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Motion For New [Trial] will [be] heard on April 16, 2001 at 9:00 A.M. The motion is set for one hour.

ENTERED this 9th day [of] March 2001.

Next, on April 2, 2001, Mr. Agbigor filed an extensive “Motion for New Trial” asserting:

1. Mr. Agbigor’s Parental Rights were terminated in violation of his Due Process Rights as guaranteed by both United States and Tennessee Constitutions. The Department of Children’s Services directly, and through it[s] agents, repeatedly informed Mr. Agbigor that termination proceedings were against Mrs. Agbigor only and that the goal for him was reunification with his children. Based upon this information, Mr. Agbigor was le[d] to believe that proceeding[s] were to terminate his parental rights solely as they related to his non-biological children.

2. Mr. Agbigor's Parental Rights were terminated in violation of his Right to Counsel as guaranteed by both United States and Tennessee Constitutions, and provided for by Tennessee Supreme Court Rule 13. At the onset of the trial the court granted Mr. Agbigor's attorney's motion to withdraw. The motion was based upon counsel's being unable to communicate with his client prior to trial and therefore he was unable to adequately prepare for trial. Mr. Agbigor was not present at the start of the trial. While there is factual dispute of whether Mr. Agbigor failed to communicate with his attorney prior to trial, regardless of this factor, it was error to allow Mr. Agbigor's attorney to withdraw. Mr. Agbigor's attorney has been involved with this case from the start and had intimate knowledge of the case. Mr. Agbigor's attorney had filed, and litigated, a "Motion To Dismiss The Petition To Terminate Parental Rights" in this matter. Therefore, even in the absence of cooperation by Mr. Agbigor, his attorney could have adequately represented him at trial. Moreover, Mr. Agbigor is entitled to be represented by counsel at a termination trial regardless of his level of cooperation.

3. Mr. Agbigor's Parental Rights were terminated in violation of his Right To Counsel as guaranteed by both United States and Tennessee Constitutions, and provided for by Tennessee Supreme Court Rule 13. If Mr. Agbigor had been represented by counsel, there is a substantial likelihood that his parental rights would not have been terminated.

4. The Department of Children's Services improperly allowed Ms. Agbigor to testify about Mr. Agbigor sexually abusing his daughter because the Department of Children's Services had previously deter[mined] that Ms. Agbigor's accusations were not cred[ible]. Based upon Ms. Agbigor's accusations, the Department included those allegations in the original petition for abuse and neglect. After an investigation, the Department determined that the allegations were unfounded.

5. Mr. Agbigor's fundamental liberty interest regarding custody of his minor children as guaranteed by both United States and Tennessee Constitutions, was violated, due to this Court's termination of his parental rights. This violation was a result of the Department of Children's Services['] failure to establish by clear and convincing evidence that there were grounds to terminate Mr. Agbigor's parental rights, nor did the Department establish by clear and convincing evidence that it was in the children's best interest that the parent-child relationship be abolished.

WHEREFORE, Richard Agbigor, Sr., moves this Court to grant his Motion For New Trial.

This motion for a new trial was accompanied by an extensive affidavit of Richard O. Agbigor, Sr. and was supplemented by an amended motion for a new trial filed on April 16, 2001, which was again accompanied by an extensive affidavit of Mr. Agbigor. The court heard the motion for a new trial on April 16, 2001, which hearing included testimony from Richard Agbigor, Sr. At the beginning of the April 16, 2001 proceedings, the court and the parties addressed the procedural and jurisdictional difficulties arising from the filing of these motions in the trial court while the appeal was pending in this Court.

MS. CRAWFORD: I think as a preliminary matter, I need to ask the Court to strike this motion on the basis, number one, that a final - - an original final decree was entered in this case from which an appeal was perfected. After the appeal was perfected, I found some typographical errors with regard to the final decree, so filed an amended final decree.

The motion for new trial was not filed within the 30 days from the original final decree, it was filed within 30 [days] from the amended final decree. The case has now been perfected to the Court of Appeals.

It's the State's position that the Court of Appeals is the proper forum for this argument and not the trial court. There is not even a record still here in the trial court. From what I understand, it was forwarded up last week to the Court of Appeals.

And therefore, our first response here is going to be that we're not even here in the proper forum to argue this motion. Which would make any testimony moot if the Court agrees with that argument.

Secondly, I'm going to object to Mr. - - for the record, to Mr. Agbigor's testimony on the basis that since the record has already been completed and perfected in the Court of Appeals based on the appeal that has been filed, I think this is just kind of a backdoor attempt to try to open the record from the Court of Appeals that's already been sent up there to include further testimony that should not be allowed to be included. Because the records already been sent up.

THE COURT: Ms. Feirman.

MS. FEIRMAN: Your Honor, let me first address why I did not file within the time limit. I was appointed on - - I was not the original attorney on this case. I was appointed on, and I may be off a day or two, November 20th, I'm going to say. It was the Thursday before - - it was the Wednesday before the Thanksgiving vacation. By the time I actually got even started on it, my 30 days had expired.

The reason it was filed as late as it was filed is I was trying to get the records from Omni. I started the second week in December to get the records from Omni. Omni for some reason was under the impression that I did not have the legal authority to look at that.

I called DCS to have them talk to them. I called Ms. Crawford. She couldn't help me because Doug Diamond needed to help me. Doug Diamond, because he was now being dragged around on the federal suit did not get a chance to talk to Omni until almost the middle of February. I had been diligently two or three times a week been trying to get the records.

THE COURT: Well, why didn't you ask the Court for an order?

MS. FEIRMAN: Because all the time through it, it was - - I kept on saying, you know, I'm going [to] need to - - just let me take care of it, sort of as we got to it, but Doug did not. But as soon as he did they let me into the records. The reason that - - the crux of this argument has to do with what Omni told Mr. Agbigor. And that, in fact, had an awful lot to do with IF not everything to do with why we are here.

Regardless of whether or not this Court wants to hear that, that evidence is crucial for the Court of Appeals. Normally it's done in a motion for new trial and they will not hear anything that's not included in the motion for new trial. If I should have gone to the Court and got a court order sooner that's my fault. And I do apologize on that. I was doing what I thought was the very best I could without interfering with the Court. When I got the records I filed it as quickly as I could.

THE COURT: I'm going to take this under advisement and I'll make one ruling on all of this. I'm going to go on and hear your evidence today. We have been bent over backwards in this case for about two years now.

MS. FEIRMAN: I appreciate that.

THE COURT: To insure that everybody had an opportunity to be heard. And it appears that this Court is still bending over backwards on that.

MS. CRAWFORD: Your Honor, I would also just for the record like to point out, and Your Honor is well aware of the fact that a Rule 60 motion for a new trial is based on mistake, inadvertence, surprise or neglect. None of the four of which we see any allegations were made in the motion for a new trial.

And therefore, you know, the Court has discretion to hear motion for new trial certainly, but it's based on - - and it says for any other reason. But basically, as I previously stated, the other reasons I see listed in here are just an attempt to get additional evidence added to the record.

MS. FEIRMAN: Well, two things. The Court of Appeals will not, in fact, hear any error that is not first allowed to the Court to correct on its own. The Court of Appeals cannot hear it until I give this Court the opportunity to correct its mistakes.

THE COURT: I've already said I'm going to hold my ruling and give you a chance to be heard.

MS. FEIRMAN: We will just go ahead and not argue anymore. Thank you, Your Honor.

At the conclusion of the April 16, 2001 hearing, the trial court took the matter under advisement and, on April 24, 2001, entered its order disposing of the motion for a new trial:

This cause came on to be heard on the 16th day of April, 2001 before the Honorable Betty Adams, Judge of the Juvenile Court of Davidson County, Tennessee, upon the Motion for a New Trial, statements of counsel and the entire record, from all of which the Court took this matter under advisement and then issued this opinion. The Court finds that this case is currently on appeal and jurisdiction of this matter is currently in the Court of Appeals and no longer in the Juvenile Court. The record has already been sent to the Court of Appeals. Further, the Court finds there has not been a showing of mistake, inadvertence, fraud or neglect or any other reason to justify the granting of said motion. Accordingly the Court respectfully denies the motion.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Motion for a New Trial is denied.

All of the preceding discussion is made necessary by the differences in standards applicable to a Tennessee Rule of Civil Procedure 60.02 motion, as opposed to the standards applicable to a Rule 59 motion.

While the granting or denial of a Tennessee Rule of Civil Procedure Rule 59 motion rests largely in the discretion of the trial court, *Eastman v. Boyd*, 605 S.W.2d 237 (Tenn. Ct. App. 1979), such trial's court discretion under Rule 60.02(5) is drastically limited to the most unique, exceptional, and extraordinary circumstances involving extreme hardship. *NCNB Nat'l. Bank v. Thrailkill*, 856 S.W.2d 150 (Tenn. Ct. App. 1993); *Tyler v. Tyler*, 671 S.W.2d 492 (Tenn. Ct. App. 1984); *Underwood v. Zurich Ins. Co.*, 854 S.W.2d 94 (Tenn. 1993); *Banks v. Dement Constr. Co., Inc.*, 817 S.W.2d 16 (Tenn. 1991).

In construing Rule 60.02, this Court has held:

Tennessee Rule of Civil Procedure 60.02 is not for use by a party that is merely dissatisfied with the results of his case. *Toney v. Mueller Co.*, 810 S.W.2d 145, 146 (Tenn. 1991). This rule is to be used only in those cases that meet one or more of the criteria set forth in the rule. *Id.* The principle of finality is firmly imbedded in the procedural rules and, therefore, Rule 60.02 is an "escape valve" that should not be easily opened. *Id.* The burden is upon the movant under a Tennessee Rule of Civil Procedure 60.02 motion to show that the movant is entitled to relief and there must be proof of the basis on which relief is sought. *Banks v. Dement Constr. Co.*, 817 S.W.2d 16, 18 (Tenn. 1991). *Holt v. Holt*, 751 S.W.2d 426, 428 (Tenn. App. 1988).

NCNB Nat Bank of North Carolina v. Thrailkill, 856 S.W.2d 850, 853 (Tenn. Ct. App. 1993).

The April 2 and April 16, 2001 motions styled as "Motions for New Trial" cannot be construed as Rule 59 motions since they are filed more than thirty days after the October 2000 order and the February 6, 2001 decree.

The scope of review on appeal involving a Rule 60.02 motion is an abuse of discretion standard. *Toney v. Mueller Co.*, 810 S.W.2d 145 (Tenn. 1991); *Day v. Day*, 931 S.W.2d 936 (Tenn. Ct. App. 1996). Appellant filed timely notice of appeal from the order overruling his Motion for a New Trial.² At the April 16, 2001, hearing Richard Agbigor, Sr. testified that, because certain of the Omni progress reports preceding the July 24, 2000 termination hearing indicated that the goal

² This second appeal was docketed with this Court and given a separate case number, M2001-01289-COA-R3-JV. By order of this Court of July 13, 2001, the two appeals were consolidated pursuant to Tennessee Rule of Appellate Procedure 16(b).

of DCS was reunification of R.A. and L.M.A. with their father, he thought all the time and all the way through the termination hearing that termination of his parental rights to these two children was not in issue. He further insisted that he was in contact with his previous attorney, Mr. Miller, prior to the termination hearing, and if Mr. Miller said otherwise, he was lying.

While the record shows that Mr. Agbigor is correct that some of the pre-termination hearing Omni Visions progress reports indicated that reunification with the father of R.A. and L.M.A. was the goal, the determinative question is whether or not Mr. Agbigor knew prior to and at the time of the July 24th and 25th, 2000, termination hearing, as well as the subsequent hearing of September 1, 2000, that termination of his parental rights as to R.A. and L.M.A. were being tried. No statutory or common law clear and convincing evidence rule applies to the determination of this question; thus, it is a pure credibility call in which great deference is accorded to the judgment of the trial court who has the opportunity to observe the manner and demeanor of witnesses. *McCaleb v. Saturn*, 910 S.W.2d 412, 415 (Tenn. 1995); *Weatherford v. Weatherford*, W 1999-01014-COA-R3-CV, 2000 WL 1891057 (Tenn. Ct. App. Dec. 29, 2000).

Careful reading of the transcript of the termination hearings indicates ample reason for the trial court to discount the credibility of Richard Agbigor. When he walked into the courtroom on July 24, 2000, an hour late, he was promptly addressed by the court about Attorney Thomas Miller.

THE COURT: Mr. Agbigor, your counsel has asked to be relieved. Your attorney has asked to be relieved because evidently there's a period of time he was totally unable to get in contact with you. And he obviously, since he couldn't get in contact with you, was unable to prepare for today's proceedings. So he has withdrawn from your case.

If Attorney Miller was lying, as asserted by Mr. Agbigor in his April 16, 2001 testimony, Mr. Agbigor knew it at the time the court carefully explained to him the reason for his counsel's withdrawal, and Mr. Agbigor chose to say nothing.

He sat through the hearing and listened to the testimony of witnesses who were talking directly about his biological children, R.A. and L.M.A. Leslie Collins, a contract therapist for Omni Vision dealing with R.A., was one such witness. She testified:

Q. Based on your experience and your education and your therapy with [R.A.], what do you foresee [R.A.'s] needs to be in the future?

A. I think [R.A.] needs to be in a place that has a lot of structure. He needs social skills. He needs a lot of anger management and a lot of these things we are doing during his therapy. [R.A.] is very introverted. He does not talk much. He's perfectly happy to sit in the corner and just sit there. And he withdraws, which can be good sometimes, but it is not good all the time. And so we're working on that. And I'm working on also perspective taking, his being able to see other people's sides of what's going on. That my curb a little of the aggression. So one of the

things I'm having the foster mother do is talk to him about describing people and describing things outside of himself, just general objective descriptions, to get him to do that.

He also has problems focusing, which I believe they diagnosed him with attention deficit disorder. But I don't know if that's the case. I would also think that he would need psychological evaluation, a complete psychological evaluation just to determine what exactly is going on.

Q. Is he in a therapeutic placement?

A. Yes.

Q. Would you recommend continued therapeutic placement?

A. Yes, I would.

Q. Have the foster parents been receptive to your requests?

A. Yes, they have.

Q. Can you project how long he will need a therapeutic placement?

A. Honestly, no, I can't.

....

Q. You're willing to continue working in therapy with [R.]?

A. Yes.

Q. Has he progressed while being in therapy with you?

A. Yes, he has. He's moving slowly. His behaviors at school have increased - - I mean, not increased, but decreased. But he is starting to do - - have - - he's starting to show some empathy, not a lot, but some. The tantruming, as far as being in, being in the sessions has lessened. He is able to follow directions and he's really - - right now we're working to - - our biggest thing right now before school goes back in is to work on getting him to focus even when other things are trying - - other distractions are around. And he's working a lot on that. He's increased his ability to focus significantly.

Q. What effect, if any, do you think it would have on [R.] for his placement to be disrupted at this point?

A. I think that he would regress if the placement were disrupted, he would have to readjust to a whole new set of foster parents, a whole new set of rules. And as I stated before, he is not at all amenable to change. It takes a lot for him to adjust to change. Not to mention a new foster placement, a new placement, the disruption of this placement, maybe him not seeing his brother and sisters anymore, and I think that would be devastating to him because they have been the only constant in his life. So - - and that's one reason that I would recommend that he stay where he is because he gets to see his brother, and he talks about his brother all the time.

Q. Have you been able to observe any changes in [R.'s] behavior surrounding visits with his father?

A. On Wednesday before the visit, his behavior starts to escalate and then Fridays after the visit, the behavior is intensified. That's when a lot of the incidents occur, that's when he stuck the pencil lead into the young lady's hand, the child's hand on Friday, on Friday after one visit.

Q. What does he call his foster parents?

A. He calls his foster parents mom and dad.

The current foster father of [R.A.] testified:

Q. Mr. Berry, in my discussion with your wife, it's my understanding that while you all have not - - you've not decided that if parental rights were terminated you would adopt, you've not ruled it completely out.

A. No.

Q. And you're willing, regardless, to be there for [R.].

A. Most definitely.

All this testimony was heard by Mr. Agbigor on July 24th and July 25th, 2000.

The case was recessed until September 1, 2000. Mr. Agbigor was also in the courtroom and called the witness, Alma Elizabeth Tugman, to testify as to her willingness to assist him in taking care of R.A. and L.M.A. Mr. Agbigor was in the courtroom when counsel for DCS made her closing statement to the court which she opened by saying: "As Your Honor's well aware, this is the State's petition to terminate the parental rights of the mother and the father to all of the named children in the petition, Terry Agbigor and Richard Agbigor, the parents to [C., R.A., L.A.C., R.A., A.O.A., L.M.A.; and N.C.]."

In Mr. Agbigor's presence, counsel for DCS further argued:

Without belaboring the issue, Your Honor, I think the proof in this case has probably been more replete than the proof in a whole lot of cases in terms of the persistence of conditions or other conditions which would subject these children to continued abuse or harm if they were ever returned to their parents. I think that not only that even though Ms. Davis was only, D.J. Davis was only the guardian ad litem as to [R.A.], [A.O.A.] and [L.M.A.], obviously if you find grounds as to those, those same grounds would apply as to the other children at least in terms of persistence of conditions and noncompliance with the plan of care.

The record shows Mr. Agbigor to be an intelligent man, fluent in the English language and articulate. His whole case regarding the Motion for New Trial is based on the premise that he did not understand until October of 2000, when he attempted to visit R.A. and L.M.A., that the termination hearings of July 24th, 25th, and September 1, 2000, involved the issue of termination of his parental rights as to R.A. and L.M.A. The trial judge obviously did not believe him and certainly did not abuse her discretion in denying the Rule 60.02 Motion for New Trial.

The actions of the trial court are in all respects affirmed, and costs are assessed to Richard Agbigor, Sr.

The case is remanded to the trial court for such other proceedings as may be necessary.

WILLIAM B. CAIN, JUDGE